



税务快讯

经合组织发布修订版《利润分割法应用指南》

经济合作与发展组织（以下简称“经合组织”）于2018年6月21日发布了《利润分割法（即 Profit Split Method，简称 PSM）应用指南》（以下简称“《PSM 指南》”），对2017年版经合组织转让定价指南第二章利润分割法部分进行了修订。具体而言，《PSM 指南》的内容将分别替换经合组织转让定价指南中第二章的第三部分 C 章节和第二章的附录二。

总体而言，《PSM 指南》继续关注现行经合组织转让定价指南第一章中的风险控制框架在以下两则问题中的应用：（1）何时应将利润分割法选择作为最合适的转让定价方法；（2）如何应用利润分割因子获得符合独立交易原则的结果。

适用利润分割法的三项考虑因素

《PSM 指南》提出了存在以下三种情况时，利润分割法可能是最合适的转让定价方法：

- 交易各方都作出了独特且具有价值的贡献；
- 交易各方的商业运营高度整合因此各方的贡献无法被单独可靠地衡量；
- 交易各方共同承担重大经济风险或各方分别承担密切相关的风险。

《PSM 指南》对“独特且具有价值的贡献”这一术语作出了定义。具体而言，“独特且具有价值的贡献”不仅囊括使用的资产（例如无形资产），也包含“执行的功能”。此外，《PSM 指南》还指出，作出独特且具有价值的贡献可能是判断利润分割法是否合适的“最清晰的指标”。

利润分割方法及利润分割因子

《PSM 指南》延续了 2017 年讨论稿中提及的两种利润分割方法：贡献分析法和剩余利润分割法。贡献分析法依照各企业的相对贡献程度进行利润分割。而剩余利润分割法则由两步组成：1) 第一步，确定能被可靠衡量的回报；2) 第二步，使用贡献分析法分割剩余利润。

和 2017 年讨论稿类似，《PSM 指南》没有就利润分割因子提供明确列表。《PSM 指南》指出，利润分割因子应该是可被验证的，且基于内部财务数据或可以获得的可计量市场数据。可使用的内部数据包括资产、成本、人数等。针对可能未列入资产负债表的自行开发的资产，可以使用现金流折现法等估值方法进行计量。

被分割利润

《PSM 指南》认为，为了对涉及被分割利润的交易进行准确描述，分割企业整体利润结果的做法可能是必要的。

对被分割利润的计量将基于企业间共同承担的风险。在许多情况下，营业利润可被作为最合适的被分割利润，因为各企业共同承担了整个业务中的风险。然而，如果企业仅共担了与销售量和产品生产相关的风险，而非在市场上销售产品相关的风险，那么分割毛利更为恰当。

《PSM 指南》也为何时适合分割实际利润或预计利润提供了指导意见：

- 适合分割实际利润的情形：所有关联方共同承担同一重大经济风险或各方分别承担密切相关的重大经济风险时，分割实际利润较恰当。
- 适合分割预计利润的情形：反之，当其中一方未共同承担所有重大经济风险时，分割预计利润较恰当。

无论分割实际利润还是预计利润，分割利润的基础都需根据各方在交易时点已经知晓或可以合理预见的信息而决定。

我们的观察

根据国家税务总局公告 2017 年第 6 号（以下简称“6 号公告”），税务机关可以选择使用利润分割法作为合适的转让定价方法进行分析。同时，6 号公告规定利润分割法应根据企业与其关联方对关联交易合并利润（实际或者预计）的贡献计算各自应当分配的利润额，且利润分割法主要包括一般利润分割法（即《PSM 指南》中的贡献分析法）和剩余利润分割法，这也与《PSM 指南》中的规定保持一致。

6 号公告明确要求，利润分割法的可比性分析应当特别考察关联交易各方执行的功能、承担的风险和使用的资产，收入、成本、费用和资产在各方之间的分配，成本节约、市场溢价等地域特殊因素，以及其他价值贡献因素，确定各方对剩余利润贡献所使用的信息和假设条件的可靠性等。

实务中，随着中国税务机关更多关注无形资产相关交易，以及中国市场作为实现经济价值的平台所发挥出的地域性优势在关联购销交易中对利润的贡献，我们注意到越来越多的案例中，中国税务机关更多倾向于使用利润分割法进行分析，或在使用其他转让定价方法的同时采用利润分割法进行辅助佐证分析。

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Tax Newsflash

OECD releases guidance on transactional profit split method

On 21 June 2018, the Organisation for Economic Co-operation and Development (OECD) released a report which contains revised guidance on the transactional profit split method (PSM) of Chapter II of the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPG). Specifically, the report (PSM Guidance) contains new provisions and examples that replace the current versions of Section C of Part III, Chapter II of the 2017 OECD TPG and Annex II to Chapter II of the 2017 OECD TPG, respectively.

Overall, the PSM Guidance continues to focus squarely on the question of how the "risk control" framework of the revised Chapter I of the TPG might apply in the context of (i) the selection of the transactional profit split as the most appropriate transfer pricing method, and (ii) the application of a split factor that may reasonably result in an arm's length outcome.

The three profit split indicators

The PSM Guidance sets forth three factors the presence of which indicate that the transactional profit split method may be the most appropriate method. Those three factors are:

- Whether each party is making unique and valuable contributions;

- Whether the business operations of the parties are so highly integrated that the parties' contributions cannot be reliably evaluated in isolation from each other; and
- Whether the parties share the assumption of economically significant risks or separately assume closely related risks.

The PSM Guidance includes a definition of the term "unique and valuable contributions", which covers not just assets used (such as intangibles) but also "functions performed." Furthermore, the PSM Guidance states that the existence of unique and valuable contributions is "perhaps the clearest indicator" that a transactional profit split may be appropriate.

Methods and factors to split profits

The PSM Guidance contains the same two profit split methods as the 2017 discussion draft: the contribution analysis and the residual analysis. The contribution analysis divides profits on the basis of the relative contribution of the enterprises. The residual analysis is a two-step process: in the first step the returns that can be reliably benchmarked are determined, and in the second step the remaining profits are split using a contribution analysis.

Like the 2017 discussion draft, the PSM Guidance eschews adopting a prescriptive list of profit splitting factors. Profit split factors should be verifiable and based on internal accounting data or on measurable market data, if available. Internal data such as assets, costs, and headcount may be used. For self-developed assets, which may not be on the balance sheet, valuation techniques such as discounted cash flow may be used.

Profits to be split

The PSM Guidance recognizes that it may be necessary to segment results of the enterprises to reflect the accurate delineation of the transactions that are subject of the profit split.

The measure of profits to be split will depend on the risks the enterprises share. In many cases, operating profit may be the most appropriate measure of profits to split because the enterprises share in the risks of the entire business. However, if the enterprises share only the risks associated with the volume of sales and production of the products, and they do not share the risks associated with selling the products in the marketplace, then a split of gross profit may be appropriate.

The PSM Guidance also provides guidance on when it is appropriate to split actual or anticipated profits:

- The splitting of actual profits is appropriate when all the relevant parties share the assumption of the same economically significant risks or separately assume closely related, economically significant risks.
- A split of anticipated profits, in contrast, would be more appropriate if one of the parties does not share in the assumption of all of the economically significant risks.

Whether actual or anticipated profits are split, the basis for splitting profits must be determined on the basis of the

information known or reasonably foreseeable at the time the parties entered into the transaction.

Our observation

According to Bulletin 6 issued in 2017 by the State Administration of Taxation, tax authorities are allowed to use PSM as an appropriate transfer pricing method in reviewing and evaluating related party transactions. Bulletin 6 requires that the aggregate profits (including actual profits or anticipated profits) should be split amongst all relevant related parties based on the contribution made by each party when applying PSM. As similar to the PSM Guidance, Bulletin 6 also includes two profit split methods: (1) general profit split method (i.e. the contribution analysis method mentioned in the PSM Guidance); and (2) residual analysis method.

Bulletin 6 states that, when conducting a comparability analysis by using PSM, particular attention should be paid to various factors (e.g. functions performed, risks assumed, and assets employed by each party involved in transactions; allocation of income, costs, expenses and assets among related parties; location specific advantages such as location saving and market premium) that may be relevant to the value contribution, as well as the reliability of information and assumptions used in evaluating the contribution to the residual profit made by each related party.

As Chinese tax authorities have gradually shifted their focus to related party transactions involving intangibles and profit contributions from location specific advantages, we have noticed in some cases that Chinese tax authorities would favor PSM in transfer pricing analysis, or use PSM to supplement the analysis if other transfer pricing method has been used.

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